Nos. 73-1614 and 74-1606

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–1619

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

No. 74–1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

I. EMPLOYMENT DISCRIMINATION IS NOT A RELEVANT CONSIDERATION FOR THE FEDERAL POWER COMMISSION IN CARRYING OUT ITS STATUTORY RESPONSIBILITIES

1. NAACP states that the FPC must consider matters of national policy which are "related to the agency's discharge of its duties." (NAACP Br. p. 17)

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We do not quarrel with this articulation of the breadth of the "public interest" concept as it applies to the FPC. Nor do we contest that equal employment opportunity is a national policy of some significance. However, despite an array of statutory citations demonstrating the extent to which elimination of employment discrimination is national policy, NAACP cites no legislation directing or permitting the FPC to consider employment discrimination nor otherwise suggesting that the national policy against employment discrimination is one "related to [the FPC's] discharge of its duties."

The public interest concept embedded in the FPC's licensing and certification authority relates to areas within the purview of the statutory objectives. The thrust of those objectives are economic regulation for the benefit of the consumer and for natural resource development. FPC contends it has no authority to consider and to therefore initiate rules defining standards to be met in the area of employment discrimination as a criteria for issuing certificates and licenses.

Cases cited by NAACP for the proposition that the FPC is required to look beyond its own statutes to protect the public interest, involved matters clearly within the ambit of this agency's duties under its own statutes. They related to matters of economic concern or natural resource conservation. *Gulf States Utilities* v. *F.P.C.*, 411 U.S. 747 (1973) involved antitrust considerations. *Udall* v. *F.P.C.*, 387 U.S. 428 (1967), dealt with national conservation policy in the licensing of a hydroelectric power project. As noted by the Court of Ap-

peals below, the Water Power Act, subsequently Part I of the Federal Power Act, 16 U.S.C. 791–823, and pursuant to which the Commission issues hydroelectric licenses, mandates the preservation of water resources (FPC Pet., p. 21a).

That employment discrimination may indirectly come to the FPC's attention, as having been the cause of penalties or having been the cause of a regulatee's inability to properly function, does not authorize the Commission, under the rubric of the public interest, to promulgate regulations proscribing employment discrimination. Contrary to NAACP's statement, the FPC recognizes there are some areas of the discrimination laws which do indirectly relate to the FPC's duties under the Natural Gas Act and the Federal Power Act. As discussed in our opening brief, they involve costs arising from the imposition of penalties from, for instance, employment discrimination, which would, under the Commission's Uniform System of Accounts, be deducted from income. (FPC Brief, pp. 25–27). In this way, regulated utilities may not benefit from actions adjudicated in the appropriate judicial or administrative forum to be contrary to law. But that adjudication, in the first instance, is not a power Congress has granted to this Commission. Even if the results of employment discrimination may have a cost impact, the FPC has not been delegated authority to adjudicate in the first instance whether there exists illegal employment discrimination and to order remedies based upon its findings in matters not related to economic activity.

2. NAACP argues that the FPC must "attach appropriate conditions to licenses and certificates of public convenience and necessity, in order to assure that recipients will act legally and in conformity with the public interest." (NAACP Br., p. 13). It contends that such conditions would prevent the FPC from later having to face either of two "unacceptable alternatives": permitting ratepayers to "absorb the costs of job bias" or imposing those costs upon shareholders" which could impair the company's financial health." (*Ibid.*) NAACP assumes, without foundation, that these costs would not be incurred should the FPC have authority to prescribe additional requirements upon its regulatees duplicative of present laws and regulations of the EEOC and a myriad of other agencies. We have already noted that if costs for employment discrimination were assessed as penalties by other agencies, the FPC would exclude those amounts for ratemaking purposes. Thus, Commission regulations against employment discrimination would add nothing to the present abilities of the FPC to disallow the flow-through to consumers of costs for employment discrimination already finally adjudicated as penalties. Only if the FPC were to adjudicate the issues in the first instance, in place of the EEOC, might there tend to be an impact on discrimination. In any event, the result would merely substitute one agency, not expert in the field, for another which has the expertise, without additional administrative efficiency. But, the allocation of remedial duties among the agencies is a matter for the Congress to decide.

On the other hand, if a regulatee is already willing to permit its shareholders to absorb costs of discrimination, knowing the FPC will not permit it to flow-through to its consumers penalties for discrimination, there is no reason the imposition of Commission Rules on the matter would act as a further deterrent.

Nor are certificate conditions a panacea. The unsatisfactory remedy for violating a condition would be withdrawal of operating authority to the detriment of the customers of the system, or lengthy litigation in the courts pursuant to the general remedial sections of the FPC's statutes providing for criminal penalties. Thus, even with the certificate conditions NAACP seeks, the Commission ultimately could again be faced with the same unacceptable alternatives NAACP presently sees, *i.e.*, whether to permit the consumer to pay costs of job bias or impose the costs on the shareholders to the possible impairment of the company's financial health.

3. NAACP characterizes as "non-remedial" costs resulting from diminished labor productivity and efficiency due to exclusion of a portion of the potential workforce, regardless of qualifications, and demoralizing effects of discrimination (NAACP Br. p. 22–3). NAACP indicates it is "likely" non-remedial costs exceed remedial costs under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 253 (NAACP Br., p. 26). In asking the FPC to prevent such "non-remedial costs" NAACP suggests this Commission should move further, beyond even the Congressional mandate of Title VII, (apparently pursuant to the FPC's own enabling statutes) and ferret out these

"implicit" costs arising from prohibited discrimination, and reduce rates accordingly. Moreover, NAACP suggests that the FPC should attempt to prevent the passing along of these unquantifiable costs although other agencies mandated to act in this area have apparently been unsuccessful in developing a method to quantify or to remedy such discrimination. It argues that, difficulty in quantification does not make "non-remedial" costs any more a proper burden to impose upon consumers (*Id.*, p. 25).

While these costs may be "non-remedial" in the sense that back pay awards and prospective relief are not provided for, even though they are costs incurred by employment discrimination, it does not follow, as NAACP suggests, that the FPC has authority to proscribe the employment discrimination giving rise to those costs. The FPC's statutes, as the Court of Appeals found, do not provide the FPC the authority to consider employment discrimination *per se*.

4. NAACP mischaracterizes FPC's position when it suggests the "FPC contends that Congress has endeavored in the civil rights laws to centralize all government concern with the problems of employment discrimination in a single authority, the Equal Employment Opportunity Commission." (NAACP Br., p. 34). To the contrary, the FPC recognizes other agencies and Departments of the Federal government have been delegated responsibilities in these areas. The FPC contends, however, that while Congress has several times delegated authority to other federal entities, and primarily the EEOC, it has never specifically delegated authority in the area of employment dis-

crimination to the FPC.[1] Nor does NAACP cite any instances where an agency with plenary economic regulatory authority has been given or has been held to have jurisdiction over employment discrimination, either pursuant to its general enabling legislation or existing statutes relating to employment discrimination.

5. NAACP objects that although the FPC recognizes it may disallow costs that are unnecessary or illegitimate, that has "no practical effect since [the FPC] has no regulations and no procedures by which consumers may be protected from these needless expenses." (NAACP Br. p. 28). NAACP's statement indicates it fails to recognize that the many provisions of the Uniform System of Accounts as further applied in rate proceedings and the Commission's regulations with respect to certain expenses, such as exploration and development expenses, serve to provide standards for permissible costs. Moreover, one portion of the issue here is not whether regulations exist that will help determine which costs may be passed on in rates, but whether the FPC may in the first instance determine what activities of its regula-

[1] The Commission in its Opinion No. 623 stated: "As pointed out, *infra*, regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies." (J.A. 56), and we stated in our brief, "The Commission does not contend no remedies other than Title VII are available for employment discrimination, and the Commission's opinion recited several such remedies (Pet. App. 50a, 54a–57a). Rather the Commission contends that concurrent jurisdiction urged by NAACP has not been given to the Federal Power Commission." (Br. p. 22).

tees constitute employment discrimination and thereafter, having made a determination that employment discrimination has occurred, to disallow costs associated with those amounts and to thereby deny or condition certificates.

6. Cases cited by NAACP do not support its proposition that the language of two rate sections of the Federal Power Act and the Natural Gas Act (Sections 205 and 4, respectively) regarding undue discrimination mandate jurisdiction in the FPC to consider, in the first instance, employment discrimination (NAACP Br. p. 29).[2] Those cases dealt specifically with service discrimination not here in contention and over which the FPC recognizes its plenary powers. The issue before this court was not under consideration in those cases. NAACP's reliance upon those cases which are so far afield from the issue here serves only to emphasize the lack of judicial support for its expansive statutory interpretation. A fair reading of *Boynton* indicates the Court's dicta regarding "discrimination of all kinds" contemplated all kinds of discrimination in service and that discrimination in employment was not within the breadth of its meaning or consideration. The same analysis is also true for the *Mitchell* case.

7. NAACP also goes beyond a strict statutory interpretation argument and discusses pragmatic considerations of FPC jurisdiction over employment discrimi-

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[2] *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *Mitchell* v. *U.S.*, 313 U.S. 80 (1941).

nation. It argues that FPC authority over employment discrimination would be more effective in assuring compliance with employment discrimination laws than existing rules which prohibit the federal government as a consumer, from contracting for goods or services from anyone engaged in employment discrimination (NAACP Br., pp. 33–4). Its contentions do not withstand scrutiny. NAACP suggests conditions on licensing and certification are necessary to assure full compliance with such laws rather than existing remedies (NAACP Br., p. 34). It contends that the government as consumer can better assure compliance with the laws by certificate conditions rather than by not contracting for services. One difficulty in NAACP's suggestion is that the FPC's remedies for a regulatee's failure to abide by the FPC's certificate conditions are no less time consuming than the alternative, posed by NAACP: a suit against the utility by another government entity. The FPC's remedy for failure to abide by conditions would be lengthy administrative proceedings subject to appellate review to the end that certificate authority could be withdrawn, all to the detriment of existing utility consumers served under that certificate authority. If the regulatee is violating the existing laws and regulations against employment discrimination, there is no reason to believe an additional FPC sanction would cause him to cease his discriminatory activity. If revocation of a certificate were the added remedy, all customers might suffer by the loss in service. Existing sanctions do not threaten that harsh result.

II. THE FIFTH AMENDMENT DOES NOT REQUIRE THE FEDERAL POWER COMMISSION TO ACT AFFIRMATIVELY TO PROSCRIBE EMPLOYMENT DISCRIMINATION

NAACP argues that the essential nexus between state acts and racial discrimination is the "significant tendency to facilitate, reinforce, and support private discrimination." (NAACP Br. p. 57). While not incorrect, this statement is an incomplete statement of the applicable legal test. *Green* v. *Kennedy,* for example, is based upon the Court's findings, "that the tax benefits under the Internal Revenue Code mean a substantial and significant support by the Governmnt to the segregated private school pattern."[3] Even in *Norwood* v. *Harrison* (from which NAACP's language comes) this Court stated, "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organizations and continuation of a segregated system of private schools which * * * may discriminate if they so desire."[4]

Thus, the test for state involvement in private racial discrimination is that the state "aid" must be significant[5] and the aid must further, albeit indirectly, the discrimination. A test which focused solely on the fact of "aid" would, for example, preclude local fire protection of discriminatory private schools such as were involved in *Norwood* and *Green.* Certainly, then, NAACP's statement of the applicable test is deficient.

Once the state of the law as enunciated by this

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[3] 302 F. Supp. at 1134.

[4] 413 U.S. 455 at 467.

[5] On this point, see also *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, quoted in our opening brief, p. 38.

Court is properly expressed, it becomes clear that the Fifth Amendment does not require the FPC to act affirmatively to proscribe discrimination by its regulatees—there is an insufficient nexus between the FPC's actions and alleged discrimination. It is inconsequential that some "benefits" may accrue to entities regulated by the FPC. Unless these "benefits" themselves have a significant tendency to aid private discrimination there is no constitutional duty for the government to cease its aid. The setting of rates or granting of certificates by the FPC has no such tendency to foster private discrimination.

It is therefore respectfully submitted that insofar as the judgment of the court of appeals set aside Opinion Nos. 623 and 623–A of the Federal Power Commission, the judgment should be revised.

Respectfully submitted.

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I authorize the filing of this brief.

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